Circuit Court for Montgomery County
Case No. 132117C

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 498

September Term, 2018

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JAMES POLK JACKSON

v.

STATE OF MARYLAND

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Meredith,
Berger,
Salmon, James P.
(Senior Judge, Specially Assigned),

JJ.

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Opinion by Salmon, J.

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Filed: June 18, 2020

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Appellant, James Polk Jackson ("Jackson"), was indicted in the Circuit Court for Montgomery County, Maryland, and charged with first-degree murder and armed robbery. Following a jury trial, where he was tried along with his co-defendant, Ruben Ortiz, appellant was convicted of the lesser included offense of second-degree murder.[1] After he was sentenced to thirty years' imprisonment, he timely appealed and asks us to answer the following questions:

1. Did the court err in denying [a]ppellant's motion to suppress?
2. Did the court err in redacting [a]ppellant's statement and proceeding with a joint trial?
3. Did the court err in denying [a]ppellant's motion for mistrial and in admitting bad acts evidence?
4. Did the court err in instructing the jury regarding accomplice liability?

For the following reasons, we shall affirm.

## I.

## EVIDENCE PRODUCED AT TRIAL

### A. Trial Testimony of Shanee Cox

On the evening of May 27th into the morning of May 28, 2017, Shanee Cox ("Cox") and her boyfriend[2], Ruben Ortiz ("Ortiz"), were selling marijuana in downtown Silver

[1] Ortiz was similarly charged with first-degree murder and armed robbery and was convicted by the same jury of second-degree murder. He filed a separate appeal. *See Ortiz v. State*, No. 628, Sept. Term, 2018.

[2] Besides being Ms. Cox's boyfriend, Ortiz was also the father of Ms. Cox's children.

Spring, Maryland. After exchanging phone numbers with a group of potential buyers, Cox and Ortiz went to the grounds of the Days Inn ("the hotel") on 13th Street in Silver Spring to complete the sale of marijuana to those prospective purchasers. When Ortiz displayed the marijuana, the group of "purchasers" told him to walk into an alley. While in the alley, the "purchasers" grabbed the marijuana and punched Ortiz in the face. Ortiz ran down the alley, away from his attackers. The attackers also fled, and Cox ran inside the hotel to call the police. After the police arrived, Ortiz emerged from the alley bleeding. He was missing both his shoes as well as the outer shirt he had been wearing over a T-shirt.

When the police left, Ortiz called his brother, Antonio, to tell him he had just been assaulted. Ortiz and Cox then walked back to the hotel because Ortiz wanted to confront his attackers and to recover what had been stolen. En route, they met with several other friends who offered their assistance. One of those friends was appellant.

Near the hotel, Ortiz saw one of the men who attacked him, standing outside a room while smoking a cigarette. The two began fighting. The other individuals with Ortiz and Cox rushed up to assist, and the first man ran back into his hotel room. As Ortiz's friends, including appellant, began banging on the hotel door, someone in the Ortiz group threw a stick through a window, shattering the glass. The Ortiz group did not get into the room, however, and eventually most of them left the hotel area when the police arrived. Nevertheless, the Ortiz group left someone to wait and watch the room until the police left.

Ortiz, appellant and others next entered into a plan to go back to the room that was occupied by the people who had stolen the marijuana, to get Ortiz's belongings.

After the police left the scene for the second time, Cox went to use the bathroom in a nearby restaurant. She returned to the hotel and saw appellant across the street, in the hotel's parking lot, talking to the man who was later murdered ("the victim"). While Cox stood with Ortiz and his brother, Antonio, Cox learned from Antonio that the victim told appellant he would return Ortiz's belongings. Nevertheless, Ortiz "was still upset" and "still wanted to fight."

Cox testified that she watched as the victim went back inside the hotel room, and then emerged with Ortiz's shoes and money, which he then proceeded to hand over to appellant. In response, appellant dropped the items and hit the victim in the face. Cox and the two Ortiz brothers then ran across the street and the Ortiz brothers joined appellant in attacking the victim.

During the fight, the victim fell down and Ortiz started trying to take the victim's shoes. At the same time, as Antonio Ortiz was kicking the victim, both Ortiz and appellant were punching the victim while he was down. The victim was not fighting back at that point and was "breathing heavily[.]" Cox saw the victim grab appellant's shirt in a failed attempt to get up and saw that the victim's face was covered in "a lot of blood." Appellant then "like yanked at [the victim's] hand to get him off his shirt . . . ." Cox explained that appellant was "like you know, like get off me, like nah, you're not getting up, type of thing." She then saw appellant punch the victim twice more in the face, before the victim managed to get up. But when the victim did so, he was bleeding and "struggling to breath[e]." As the victim walked towards his hotel room, Cox and her group left the scene.

Afterwards, Cox saw blood on appellant's shirt. Appellant announced to the group that he hoped the victim "doesn't die and stuff." It was at that point that Cox learned that appellant had stabbed the victim with a knife. Appellant confided to the group that he stabbed the victim "repeatedly," just below his ribcage. Appellant said he planned on going back to the scene because he threw away his knife in the bushes as he had fled. Appellant also admitted to Cox that he took the victim's watch. During her testimony, Cox was shown a surveillance video from the 7-11 convenience store located across the street from the Days Inn. From the video, she identified for the jury the participants in the fight. She also testified that she was originally charged in the subject case with murder but had entered a plea agreement with the State wherein she pled guilty to first-degree assault in exchange for her truthful testimony against Ortiz and appellant.

### B. Trial Testimony of Officer Morgan Dailey

The State called Morgan Dailey, one of the correctional officers responsible for supervising appellant while he was in pretrial detention awaiting trial in this case. Correctional Officer Dailey testified that appellant, on July 2, 2017, told her that he "stabbed a man and killed him." Appellant then clarified that statement by asserting that he had stabbed the man in the stomach area, multiple times.[3] After he stabbed the victim, appellant said that he threw the knife in a bush and ran away but went back to retrieve the knife the next day.

[3] The medical examiner testified that the victim, Sulaiman Jalloh, died of multiple stab wounds to the torso. There were no stab wounds to the stomach.

Officer Dailey also testified that appellant told her that she would "make a really good witness," and that he hoped she would not testify against him.

### C. Trial Testimony of Officer Stephen Magliaro

Correctional Officer Stephen Magliaro testified that appellant, on July 16, 2017, while in pretrial detention, told him he went to a hotel in Silver Spring and "stabbed the individual in the abdomen and chest area approximately 30 times." Appellant also told him that he had spoken to Officer Dailey, and that, if the officer were to tell anyone what she knew, "he would send somebody in his family after her."

We shall include additional details as to evidence introduced at trial, *infra*, as necessary to answer the questions presented.

### D. Defense Witnesses and Arguments

Montgomery County Detective Dimitry Ruvin testified that when he responded to the scene of the stabbing, he heard over his radio a description of potential suspects. According to Ruvin, "[v]ia the clothing description and the generic description, it matched Antonio Ortiz."

Christopher Morefield, who was incarcerated in the detention center along with appellant, testified that he was on West 22 (the pod in which appellant was jailed) on July 2 and July 16, 2017, and that he did not observe appellant discussing his charges on those days or on any day in July. On cross-examination, Morefield admitted that he was not paying particular attention to any inmate's conversation with correctional officers.

At trial, appellant's counsel contended that Ms. Cox was a biased witness who should not be believed. Her bias was in favor of Ortiz because he was her boyfriend and

the father of her children. According to appellant's counsel, that bias motivated Cox to testify falsely that it was appellant who stabbed the victim. Appellant's counsel also maintained that appellant never confessed that he stabbed the victim to either of the correctional officers.

## II.

## MOTION TO SUPPRESS TESTIMONY

Appellant contends that the court erred in denying his motion to suppress statements he made to the aforementioned two correctional officers while incarcerated at the Montgomery County Correctional Facility ("MCCF") in Clarksburg, Maryland. He relies on *Miranda v. Arizona*, 384 U.S. 436 (1966). The State responds that the *Miranda* decision is inapplicable because appellant was never subject to custodial interrogation and therefore the court properly denied his motion to suppress. At the hearing appellant called no witnesses; the State called two.

### A. Suppression Hearing Testimony of Officer Stephen Magliaro

Officer Stephen Magliaro testified that at the time of appellant's confession to him, he was a "pod officer" in charge of approximately 64 inmates, but was neither a sworn police officer nor was he affiliated with the Montgomery County Police Department. Appellant was a "pod rep." The job of a "pod rep" is to make sure the "dorm is clean"; they also "give out trays to other inmates when feed-up comes out." In Magliaro's words, pod reps are "almost correctional officer helpers in the pods . . ." and are "out a little bit more than the rest of the inmates."

By July 16, 2017, Magliaro had established "rapport" with appellant, whom he had known for approximately six months at that time, due to a previous detention. In addition, on July 16, 2017, although he knew that appellant had previously spoken with Officer Dailey, he was not aware of the specific details of appellant's charges and only "was curious as to why [appellant] was back" in jail, which was the reason he asked him why he was back. The two then had a conversation. According to Officer Magliaro, "[i]t was never [his] intention to find out all the details . . . of the crime."

Appellant told Officer Magliaro that he stabbed someone and provided details but, the officer stressed, during the conversation he was not trying to "collect information" and was not taking notes: instead, "it was a conversation out of curiosity as to why [appellant] was back" in jail. In fact, at one point, the officer told appellant to "stop talking." Despite that admonition, appellant continued to talk, even while other inmates, including one identified in the transcript as "Sanchez" and another, identified as "Nulin Pena," were present. During the conversation, Pena voiced his opinion as to whether the State could convict appellant. Officer Magliaro explained that his conversation with appellant was "on and off" during his shift and included numerous breaks and the full conversation took place over a span of approximately five to six hours. He also testified that originally it was not his intention to report the conversation to the police.

At some point, however, appellant acknowledged that he had also shared details of the crime for which he was incarcerated, with Officer Dailey. Appellant said that he understood that Officer Dailey was "working towards becoming a member of the Montgomery County Police Department," and he was "worried that she would basically

bring those details to light." Appellant told Officer Magliaro that if Officer Dailey shared those details, "he would send somebody in his family after her." Officer Magliaro interpreted this as a threat against his fellow correctional officer and told Officer Dailey about appellant's threat. Officer Magliaro then told a police officer what appellant had said.

He stressed that it was not his original intention to "get involved" and that "at the jail sometimes people say things more than they should."

At the conclusion of examination by the parties, the court asked for specifics of the statement from appellant to Magliaro. One problem was that there was no definitive identification of what "statements" appellant sought to suppress except that defense counsel argued that "I want to keep out everything." Thereafter, Officer Magliaro confirmed details from his report, including that appellant told him that "Ortiz was robbed of, I believe shoes, money, and I believe drugs as well. And [appellant said] nobody does that to either his friend or his family, and that's when they made a decision to approach the individual that robbed . . . Ortiz."

According to Officer Magliaro's written report, appellant told Officer Magliaro that he "stabbed [the] victim so many times that his lung almost came out. Victim staggered, went to the hotel room, and left. They left." Further, "[appellant] stated that the [victim] was walking like a zombie," and that "his guts were all hanging out as he was walking away from the hotel, but he didn't make it and collapsed." Magliaro added that appellant told him that, after the stabbing, he "had blood all over his white T-shirt."

Upon further re-direct examination, Officer Magliaro agreed that appellant told him he stabbed the victim in the torso and that "I believe the words he gave were it's either his lung is hanging out or his guts were hanging out." Officer Magliaro further testified that he knew that appellant had been involved in a prior, unrelated stabbing. In that regard, appellant also told him "he would not make the same mistake twice and allow [the] victim . . . [of the assault] to testify against him." Officer Magliaro also confirmed that another inmate, Pena, would have been able to hear the entire conversation as it took place in "a quiet pod."

**B. Suppression Hearing Testimony of Officer Morgan Dailey**

Officer Morgan Dailey confirmed that she was not affiliated with the Montgomery County Police Department, was not "sworn law enforcement" and was not involved in criminal investigations. In the course of her duties as a correctional officer she engaged in conversations with inmates but, prior to this case, had never reported any such conversation to the police.

On July 2, 2017, two weeks before the conversation between Officer Magliaro and appellant, she was seated at a desk near the entrance to the pod of which she was in charge. When appellant approached her, she said: "you're back so soon, what are you doing here, man?" She "expected [appellant] to give the generic answer that most inmates give," but appellant provided explicit details concerning his involvement in the murder with which he was charged. More specifically, after telling appellant that she knew Ortiz, Officer Dailey related what happened next:

[Officer Dailey]: And then he went on to tell me, you know, we're being, my little man, he [Ortiz] didn't do anything. We're getting charged with first-degree murder. He went on to tell me that the, that somebody had robbed Ortiz of his money, shoes and weed and that you know, that's his family, so you don't do that type of thing to people that he considers family. So, he felt like it was, you know, kind of an obligation of his to kind of get revenge on whoever did Ortiz wrong. And so he went back, he was I guess going to Virginia, and turned around after he'd gotten a call from Antonio Ortiz, who was Ruben's brother, saying what had happened to Ruben.

So, he turned around and came back. They all met up, Ruben Ortiz, Antonio Ortiz, [appellant] and Shaney Cox (phonetic sp.), and they all went to I guess the hotel where the victim was, to try to get his stuff back. And when they confronted him, [appellant] stabbed and killed the victim.

[Prosecutor]: Did he tell you where he stabbed the victim?

[Officer Dailey]: He stabbed him in his stomach.

[Prosecutor]: Okay, and did he make any comments about the kind of injuries that were inflicted on the victim?

[Officer Dailey]: He just said that he stabbed him a lot of times, almost to the point where, you know, organs were falling out.

[Prosecutor]: And did he make any comment about what happened to the victim after he stabbed him?

[Officer Dailey]: Just that he stumbled backwards.

[Prosecutor]: And did he – Court's indulgence. Did he tell you what happened after he stabbed the victim?

[Officer Dailey]: Yes, that they, all four of them had left, and they got a lift to go somewhere, I guess to try to build an alibi. After that they just I guess went and smoked weed, tried to wipe the blood off of him, and just get away from the crime scene.

[Prosecutor]: Did he make any comments about where the knife might be?

> [Officer Dailey]: He said that he had just tossed the knife behind a bush, like in the, like as they were running. I guess away from the crime scene.
>
> [Prosecutor]: And did he say whether or not the weapon, anything had happened to the weapon after he disposed of it?
>
> [Officer Dailey]: No – oh yeah, yes, he actually had said that he had gone back the next day to get the weapon, and that he was like really high when he had gotten it, and there was I guess a camera that captured him getting the knife from whatever location it was at.

Later, appellant came back to her at various times and told her "you would make a really good witness. I just hope that you won't say anything. You know, I told you everything." Officer Dailey confirmed that these statements all occurred at her desk and that she never ordered appellant to come to the desk to speak to her. She further testified that she was not asking appellant questions during his narrative and that "he was pretty forthcoming with the information." In addition, Officer Dailey did not take notes during the conversation, but afterwards decided to write down what appellant had said.

Although she originally decided not to report the conversation, Officer Dailey changed her mind after being informed by Officer Magliaro that appellant had "made threatening statements towards me and my family." She then reported the conversation to her command staff who, in turn, contacted Montgomery County law enforcement. Once that occurred, Officer Dailey recounted to a police officer what appellant had told her.

On cross-examination, Officer Dailey testified that the conversation at issue occurred at around 8:00 a.m., after she received a call from appellant asking to be let out of his cell so that he could come and get paper towels from the supply closet located next to her desk. When appellant approached her desk, she asked him, "hey man, like what are

you doing back here so soon." The conversation that ensued lasted between 15 and 30 minutes.[4]

### C. Decision by the Suppression Court

The judge found as a fact that the two correctional officers were "not in any way acting as agents" for the police when they talked with appellant, and that they were not trying to discover evidence. Instead, they were talking "with people they have to interact with on a day-to-day basis." And, "[t]hey're not in any way investigating a crime."

After recessing so the parties could submit written memoranda, the court reconvened and denied the motion to suppress. The court found that appellant was not in custody when he talked to the correctional officers. He noted that although "there was no doubt that [appellant] was locked up," the questioning was not custodial. The court continued, "[i]n fact, this comes up in responses to general discussions and inquiries." The court added:

> [I]n fact, they had no role whatsoever to elicit incriminating information. In fact, they're all approached to deal with, they have to deal with every day, look I'm not getting into your case. You know, I'm not going to turn over evidence. They didn't intend to, well, [Dailey] didn't immediately. They didn't make reports to call the law enforcement office that were investigating these crimes. They, in fact, did not report themselves. They had to, had their

[4] We note here additional facts from the record. *See* Md. Rule 5-201(f) ("Judicial notice may be taken at any stage of the proceeding"); *see also Stovall v. State*, 144 Md. App. 711, 717 n.2 (taking judicial notice of official entries in circuit court records), *cert. denied*, 371 Md. 71 (2002). Appellant was charged with first-degree murder and armed robbery in the District Court on June 7, 2017. He was arrested twelve days later, on June 19, 2017. He made his first statement to Officer Dailey approximately two weeks later, on July 2, 2017. Following his preliminary hearing in the District Court on July 14, 2017, appellant appeared with counsel and was ordered held without bond; appellant made his statement to Officer Magliaro on July 16, 2017. Appellant was indicted in the circuit court four days later, on July 20, 2017.

> superiors instruct them to do so. Because I can understand why, they have to deal with these people every day and they have no intent whatsoever to elicit incriminating information from Mr. Jackson. I don't find that the custodial situation because he was, he had free reign in this pod to go about and do what he had to do, cleaning or go to activities. He came and went back and forth talking to the guard on and off, different situations. That is not the custodial situation that we wind up in Miranda cases and discusses [sic] about the coercive nature of the interrogation situation. He could have cut all, left any time. He initiated both conversations.
>
> And so, I do not find that these are custodial interrogations. There was not Miranda given to the defendant, but I find it needn't be in this situation. Therefore, I will deny defendant's motion to suppress in this case.

Defense counsel then questioned whether the statements were voluntary under common law, and the court found that appellant's statements were voluntary. The judge said:

> [T]hese statements were voluntarily made, in fact, I don't think the corrections officers even pressed Mr. Jackson to talk. I think it was voluntary, not even (unintelligible) or he seemed eager to discuss this matter with people that he seemed to have [a] great relationship with and voluntarily talked to them. And the statements that came forward and became concerned about threats to Officer [Dailey] in this case. But there was no pressure at all put on him. They were friendly conversations between people and as I already said previously, there was no desire to seek information. So, he was not pressed in any way for the information. So, these were completely voluntary statements.

## III.

## FIRST QUESTION PRESENTED

Appellant contends, as he did below, that he was in police custody, within the meaning of *Miranda v. Arizona*, 384 U.S. 486 (1966), when he made statements to the two correctional officers and therefore *Miranda* warnings should have been given to him prior to questioning. The State maintains that appellant, within the meaning of *Miranda*,

although incarcerated, was not in police custody when he made the statements to the officers and thus warnings were not required.

The Court of Appeals has held that review of a suppression motion:

> [I]s limited to the record of the suppression hearing. The first-level factual findings of the suppression court and the court's conclusions regarding the credibility of testimony must be accepted by this Court unless clearly erroneous. The evidence is to be viewed in the light most favorable to the prevailing party. We "undertake our own independent constitutional appraisal of the record by reviewing the law and applying it to the facts of the present case."

*Thomas v. State*, 429 Md. 246, 259 (2012) (quoting *State v. Tolbert*, 381 Md. 539, 548 (2004)).

In Maryland, a confession may be admitted against an accused only when it has been "determined that the confession was (1) voluntary under Maryland non-constitutional law, (2) voluntary under the Due Process Clause of the Fourteenth Amendment of the United States Constitution and Article 22 of the Maryland Declaration of Rights, and (3) elicited in conformance with the mandates of *Miranda*." *Brown v. State*, 452 Md. 196, 209 (2017) (quotation marks, citations and footnote omitted). Under *Miranda*, *supra*, the Supreme Court has recognized that any police interview of an individual suspected of a crime has "coercive aspects to it[.]" *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977) (per curiam). Nevertheless, "[o]nly those interrogations that occur while a suspect is in police custody, . . . 'heighte[n] the risk' that statements obtained are not the product of the suspect's free choice." *J.D.B. v. North Carolina*, 564 U.S. 261, 268-69 (2011) (quoting *Dickerson v. United States*, 530 U.S. 428, 435 (2000)). The burden of demonstrating that the questioning occurred during "custody" is on the defendant. *Paige v. State*, 226 Md.

App. 93, 102 (2015). If it is shown that a suspect made a statement during custodial interrogation, it then becomes the Government's burden to show, "as a 'prerequisit[e]' to the statement's admissibility as evidence in the Government's case in chief, that the defendant 'voluntarily, knowingly and intelligently' waived his rights." *J.D.B.*, 564 U.S. at 269-70 (citing *Miranda*, 384 U.S. at 444, 475-76).

The answer to the first question presented in this appeal turns on whether appellant was in "custody" within the meaning of the *Miranda* decision, when he spoke to the two correctional officers. The Court of Appeals has provided the following guidance in this regard:

> In analyzing whether an individual is in custody for *Miranda* purposes, we ask, under the "totality of the circumstances" of the particular interrogation, "would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave." *Thompson v. Keohane*, 516 U.S. 99, 112, 116 S.Ct. 457, 465, 133 L.Ed.2d 383, 394 (1995); *see also Owens v. State*, 399 Md. 388, 428, 924 A.2d 1072, 1095 (2007); *Whitfield* [*v. State*], 287 Md. [124,] 141 [(1980)]. The "totality of the circumstances test" requires a court to examine the events and circumstances before, during, and after the interrogation took place. *Owens*, 399 Md. at 428-29, 924 A.2d at 1095-96; *Whitfield*, 287 Md. at 140-41, 411 A.2d at 425. A court, however, does not parse out individual aspects so that each circumstance is treated as its own totality in the application of the law. Rather, when doing a constitutional analysis, a court must look at the circumstances as a whole. *Ransome v. State*, 373 Md. 99, 104, 816 A.2d 901, 904 (2003) (stating that a court conducting a "totality of the circumstances test" must not "parse out each individual circumstance for separate consideration").

*Thomas*, 429 Md. at 259-60; *see also Berkemer v. McCarty*, 468 U.S. 420, 440 (1984) ("It is settled that the safeguards prescribed by *Miranda* become applicable as soon as a suspect's freedom of action is curtailed to a 'degree associated with formal arrest'") (quoting *California v. Beheler*, 463 U.S. 1121, 1125 (1983) (per curiam)).

Relevant factors to that inquiry include the length and location of the detention, how many officers were present, what the officers and defendant did, whether the defendant was restrained, whether he was questioned as a suspect or a witness, and how the interrogation started and concluded. *Brown*, 452 Md. at 211; *accord Howes v. Fields*, 565 U.S. 499, 509 (2012) (citations omitted). "[W]hether an individual's freedom of movement was curtailed, however, is . . . a necessary [but] not a sufficient condition" in this analysis; the court must also determine "whether the relevant environment presents the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*." *Howes*, 565 U.S. at 509 (quotation marks and citation omitted).

The Supreme Court addressed a *Miranda* claim in the context of the incarceration of a suspect in *Maryland v. Shatzer*, 559 U.S. 98 (2010):

> We have never decided whether incarceration constitutes custody for *Miranda* purposes, and have indeed explicitly declined to address the issue. Whether it does depends upon whether it exerts the coercive pressure that *Miranda* was designed to guard against – the "danger of coercion [that] results from the interaction of custody and official interrogation." To determine whether a suspect was in *Miranda* custody, we have asked whether "there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." This test, no doubt, is satisfied by all forms of incarceration. Our cases make clear, however, that the freedom-of-movement test identifies only a necessary and not a sufficient condition for *Miranda* custody. We have declined to accord it "talismanic power," because *Miranda* is to be enforced "only in those types of situations in which the concerns that powered the decision are implicated."

*Id*. at 112-13 (internal citations omitted); *accord Howes*, 565 U.S. at 509; *see Clark v. State*, 140 Md. App. 540, 568-70 (2001) (concluding that prison confinement does not necessarily equate with "custody," and statement made to a correctional caseworker during a review about appellant's prison housing situation was voluntary), *cert. denied*, 368 Md. 527

(2002); *see also United States v. Ellison*, 632 F.3d 727, 729 (1st Cir. 2010) ("[C]ustody under *Miranda* means a suspect is not free to go away, but a suspect's lack of freedom to go away does not necessarily mean that questioning is custodial interrogation for purposes of *Miranda*").

In a situation where an inmate has already been convicted, the *Shatzer* Court pointed out:

> Without minimizing the harsh realities of incarceration, we think lawful imprisonment imposed upon conviction of a crime does not create the coercive pressures identified in *Miranda*.
>
> Interrogated suspects who have previously been convicted of crime live in prison. When they are released back into the general prison population, they return to their accustomed surroundings and daily routine—they regain the degree of control they had over their lives prior to the interrogation. Sentenced prisoners, in contrast to the *Miranda* paradigm, are not isolated with their accusers. They live among other inmates, guards, and workers, and often can receive visitors and communicate with people on the outside by mail or telephone.
>
> Their detention, moreover, is relatively disconnected from their prior unwillingness to cooperate in an investigation. The former interrogator has no power to increase the duration of incarceration, which was determined at sentencing. And even where the possibility of parole exists, the former interrogator has no apparent power to decrease the time served.

*Maryland v. Shatzer*, 559 U.S. at 113-14 (footnote omitted).

The Supreme Court later provided additional guidance on this matter, as follows:

> When a prisoner is questioned, the determination of custody should focus on all of the features of the interrogation. These include the language that is used in summoning the prisoner to the interview and the manner in which the interrogation is conducted. An inmate who is removed from the general prison population for questioning and is "thereafter . . . subjected to treatment" in connection with the interrogation "that renders him 'in custody' for practical purposes . . . will be entitled to the full panoply of protections prescribed by *Miranda*." *Berkemer*, 468 U.S. at 440, 104 S.Ct. 3138.

> "Fidelity to the doctrine announced in *Miranda* requires that it be enforced strictly, but only in those types of situations in which the concerns that powered the decision are implicated." *Id*. at 437, 104 S.Ct. 3138; *see Shatzer*, 559 U.S. at --, 130 S.Ct. at 1221-22; *Mathiason, supra*, at 495, 97 S.Ct. 711. Confessions voluntarily made by prisoners in other situations should not be suppressed. "Voluntary confessions are not merely a proper element in law enforcement, they are an unmitigated good, essential to society's compelling interest in finding, convicting, and punishing those who violate the law." *Shatzer*, *supra* at --, 130 S.Ct. at 1222 (internal quotation marks and citations omitted).

*Howes v. Fields*, 565 U.S. at 514 (some internal citations omitted).

Here, we are persuaded that, although he was incarcerated, appellant did not meet his burden of showing that he was in "custody" within the meaning of *Miranda*, when he made the statements at issue. On both occasions, appellant voluntarily approached the correctional officers, whom he already knew, and, based on prior interactions, had an established rapport. And, importantly, appellant was never summoned by the correctional officers to come forward for interrogation. Moreover, there was no compulsion for appellant to speak to these officers and, to the extent that any questions were asked, none were accusatory. Appellant was able to move freely about the pod with the other inmates and the conversations happened in front of other inmates. *Cf. Bond v. State*, 142 Md. App. 219, 233 (2002) ("[T]he accusatory nature of the questioning" by the police officers, in the suspect's home, was a factor in determining that "an ordinary person in the circumstances would be intimidated, and would not think he could end the encounter merely by telling the officers to leave."). In fact, as mentioned earlier, Officer Magliaro told appellant at one point to "stop talking." In sum, appellant's incarceration did not "exert[] the coercive pressure that *Miranda* was designed to guard against — the 'danger of coercion [that]

results from the *interaction* of custody and official interrogation.'" *Shatzer*, 559 U.S. at 112 (quoting *Illinois v. Perkins*, 496 U.S. 292, 297 (1990)) (emphasis added). For the above reasons, we hold that the circuit court did not err when it denied the motion to suppress appellant's statements.[5]

[5] Because we hold that appellant did not meet his burden of showing that he was in custody when he made incriminating statements to the officers, we decline to address whether appellant's interactions with the correctional officers amounted to interrogation for *Miranda* purposes. *See Williams v. State*, 219 Md. App. 295, 317 (2014) ("Without the presence of both custody *and* interrogation, the police are not bound to deliver *Miranda* warnings and obtain a proper waiver of the rights to silence and counsel before questioning a suspect") (quoting *Cooper v. State*, 163 Md. App. 70, 93 (2005)) (emphasis in *Cooper*).

In addition, we note that appellant, relying on *Maine v. Moulton*, 474 U.S. 159, 176 (1985), also argues that he was denied his constitutional right to counsel, when he interacted with the two correctional officers. Although defense counsel generally raised the right to counsel argument in his written motion to suppress, the issue was not argued nor ruled upon at the motions hearing. We therefore conclude that appellant waived this argument and we decline to consider it further. *See Robinson v. State*, 410 Md. 91, 106 (2009) (concluding that even fundamental rights under the Sixth Amendment may be waived); *Owens v. State*, 399 Md. 388, 419 (2007) ("Generally, 'most rights, whether constitutional, statutory or common-law, may be waived by inaction or failure to adhere to legitimate procedural requirements'") (citation omitted); *see also White v. State*, 23 Md. App. 151, 156 (1974) ("The motion to be decided must be brought to the attention of the trial court. Appellant may not take advantage of an obscurely situate, undecided motion and stand mute in the face of repeated requests by the judge for all pending motions to be decided"), *cert. denied*, 273 Md. 723 (1975).

To the extent that appellant contends that his due process rights were violated because the statements he gave to the correctional officers were "involuntary," we reject that contention. Nothing indicates that appellant's will was overcome nor is there any indication that anything the officers said or did induced him to make an incriminating statement against his will.[6]

## IV.

## SECOND QUESTION PRESENTED

Appellant next argues that the court erred in "redacting" his oral statements to the two correctional officers, and that the redactions violated his rights to confrontation and his right to present a defense. *See generally, Crawford v. Washington*, 541 U.S. 36, 68 (2004) (holding that out-of-court statements by witnesses that are testimonial are barred under the Confrontation Clause unless witnesses are unavailable and the defendant had a prior opportunity to cross-examine the witnesses); *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973) ("Few rights are more fundamental than that of an accused to present witnesses in his own defense"). Appellant also asserts that the court erred in proceeding with a joint trial with his co-defendant, Ortiz.

As to the latter claim, the State responds that the severance issue was not properly preserved. As for the statements to the correctional officers, the State responds that,

[6] Appellant did not testify at the suppression hearing nor was any part of the officer's testimony seriously weakened or undercut in any way by cross-examination during that hearing. More importantly, it is clear that the suppression hearing judge fully believed that testimony.

inasmuch as part of appellant's oral statements implicated Ortiz, the court properly exercised its discretion in disallowing testimony about what appellant said about Ortiz, because, as against Ortiz, admission of such statements would have violated principles established in *Bruton v. United States*, 391 U.S. 123, 126, 137 (1968) (holding that, in a joint trial of co-defendants, the prosecution may not move into evidence the confession of a non-testifying defendant that inculpates a co-defendant, even if the jury is given an appropriate limiting instruction).

### A. Appellant Waived His Right to a Severance

The docket entries indicate that appellant moved "to bifurcate and sever issues" on August 18, 2017, but that the motion was denied, in writing, that same day. Nevertheless, on December 4, 2017, appellant withdrew his motion to sever, without prejudice. Thereafter, on January 22, 2018, immediately prior to jury selection, appellant's co-defendant, Ortiz, moved for severance but appellant did not join in that motion. The trial court promptly denied co-defendant's motion to sever.

Thereafter, during trial, appellant suggested that the remedy to the *Bruton* problem was severance. Appellant made that suggestion in a written motion *in limine* to exclude the "redacted statements" of the correctional officers in their entirety. That motion was filed after the trial commenced. There was no argument or ruling at trial on that *in limine* motion and appellant's trial counsel never complained about the court's failure to make a ruling. In fact, during one of the many discussions at trial of the *Bruton* problem, appellant's counsel admitted that she had not asked for a severance. Based on that admission, coupled with the fact that, prior to trial, appellant's counsel had explicitly

withdrawn her motion to sever, we conclude that appellant waived his claim that the court should have severed his trial from that of his co-defendant, Ortiz. *See* Md. Rule 4-252(b) (requiring with an exception not here relevant, that motions for severance or joinder must be filed within 30 days of the earlier of the appearance of counsel or the first appearance of the defendant before the court.[7]

### B. Confrontation and Right to Present a Defense

Appellant argues that exclusion of his complete statements to the officers impacted his right to cross-examine those officers about portions of his statements that implicated Ortiz. Appellant's counsel, at trial, objected to excluding information about Ortiz because, according to appellant's counsel, there were "contradictions" between the anticipated testimony of the two correctional officers as to what appellant had admitted. According to

[7] Throughout the proceedings, appellant's counsel's primarily argued against redaction of any part of the statements appellant made to the correctional officers concerning Ortiz. Although not entirely clear, it appears that appellant was given a continuing objection based on that argument, because, on the penultimate day of trial, before the verdict, and during a discussion concerning an instruction requested by Ortiz, the court noted appellant's "continuing objection to the joined trials." Our review of the entire record persuades us, however, that this last quoted statement by the court was not an acknowledgment that appellant made a timely motion for severance, but was instead an acknowledgement that somewhere during trial, appellant's counsel made a belated and untimely request that the cases be severed. In any event, were the issue properly preserved, we conclude that the trial court properly exercised its discretion when it earlier denied a similar motion by Ortiz for severance. *See Galloway v. State*, 371 Md. 379, 395 (2002) ("[T]he decision to join or sever charges ordinarily lies within the sound discretion of the trial court"); *see also Imes v. State*, 158 Md. App. 176, 191 ("The trial court has discretion to grant or to deny a request for a defendant's mid-trial severance"), *cert. denied*, 384 Md. 158 (2004). Severance was plainly not required because, although the court, based on *Bruton*, had to exclude what appellant said in his statements about Ortiz, nothing that was excluded was from appellant's point of view, exculpatory.

appellant, exclusion would inhibit impeachment of their testimony, violated the rule of verbal completeness, and was a denial of due process based on the defense theory that it was Ortiz, not appellant, who stabbed the victim.[8]

"The Sixth Amendment to the United States Constitution, made applicable to the States through the Fourteenth Amendment . . . provides, in pertinent part, that, '[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.'" *Langley v. State*, 421 Md. 560, 567 (2011) (quoting *U.S. Const.* amend. VI). The right of confrontation includes a criminal defendant's opportunity to "'cross-examine a witness about matters which affect the witness's bias, interest or motive to testify falsely.'" *Martin v. State*, 364 Md. 692, 698 (2001) (quoting *Marshall v. State*, 346 Md. 186, 192 (1997)). A criminal defendant's constitutional right to cross-examination, however, is not boundless. *Pantazes v. State*, 376 Md. 661, 680 (2003). Trial judges have "'wide latitude . . . to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues . . . or interrogation that is . . . only marginally relevant.'" *Smallwood v. State*, 320 Md. 300, 307 (1990) (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986)).

In addition, a criminal defendant is also guaranteed by the Sixth Amendment and Article 21 of the Maryland Declaration of Rights, the right "to produce witnesses on his own behalf[.]" *Taneja v. State*, 231 Md. App. 1, 10 (2016), *cert. denied*, 452 Md. 549

[8] This was appellant's theory, but no witness or witnesses testified that Ortiz, not appellant, stabbed the victim, nor did any document or exhibit support that theory.

(2017). This right is "'in essence, the right to a fair opportunity to defend against the State's accusations.'" *Taliaferro v. State*, 295 Md. 376, 403 (1983) (quoting *Chambers*, 410 U.S. at 294). Although fundamental, the right is not unlimited. "'T]he accused does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence.'" *Taneja*, 231 Md. App. at 10 (quoting *Taylor v. Illinois*, 484 U.S. 400, 410 (1988)).

Our standard of review is as follows:

> In controlling the course of examination of a witness, a trial court may make a variety of judgment calls under Maryland Rule 5-611 as to whether particular questions are repetitive, probative, harassing, confusing, or the like. The trial court may also restrict cross-examination based on its understanding of the legal rules that may limit particular questions or areas of inquiry. Given that the trial court has its finger on the pulse of the trial while an appellate court does not, decisions of the first type should be reviewed for abuse of discretion. Decisions based on a legal determination should be reviewed under a less deferential standard. Finally, when an appellant alleges a violation of the Confrontation Clause, an appellate court must consider whether the cumulative result of those decisions, some of which are judgment calls and some of which are legal decisions, denied the appellant the opportunity to reach the "threshold level of inquiry" required by the Confrontation Clause.

*Peterson v. State*, 444 Md. 105, 124 (2015); *accord Manchame-Guerra v. State*, 457 Md. 300, 311 (2018).

We begin with the State's initial argument that there is nothing for us to review because defense counsel did not proffer what portions of appellant's statements to the officers, concerning Ortiz, were at issue. We note that both officers provided more detail at the suppression hearing than was offered at trial, including details concerning appellant's discussions with Ortiz before the group went to the hotel where the stabbing occurred.

These details were identified in appellant's written motion *in limine* to exclude the redacted statements of the officers. We are unable, however, to find where appellant proffered that he wanted to ask questions along specific lines of inquiry. Thus, we generally concur with the State that, to the extent that appellant failed to adequately proffer, this issue is not properly preserved for our review. *See Grandison v. State*, 341 Md. 175, 207 (1995) ("A trial judge's refusal to allow a line of questioning on cross-examination amounts to exclusion of evidence; preservation for appeal of an objection to the exclusion generally requires a formal proffer of the contents and relevancy of the excluded evidence"); *see also Washington v. State*, 180 Md. App. 458, 489-90 (2008) (concluding there was no abuse of discretion in limiting cross-examination in absence of a proffer and noting "that the 'Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish'") (citation omitted).

Nevertheless, there was some discussion at trial of the questions appellant sought to ask. Although there is no written "transcript" of appellant's oral statements to either of the two correctional officers,[9] and although appellant in his brief does not specifically identify what "statements" he was prohibited from countering, as best we can glean from arguments in the trial court and appellant's brief, defense counsel posited that there was a conflict in the "statement that [appellant] allegedly [made] to the correctional officers, . . . there's the

[9] Appellant's counsel admits that she could not find any written transcript or any supporting documents along these lines. Our review of the entire appellate record leads us to a similar conclusion.

smashing of the window [at the Days Inn], Mr. Ortiz luring the victim . . . out of the room, and then [appellant] stabbing the deceased." According to appellant's trial counsel, Ortiz not appellant, was "the instigator of all of this[.]" Counsel continued that there was also a conflict whether the stabbing happened at the bottom of the stairs in an apartment complex or in the parking lot of the Days Inn. Although defense counsel did not proffer which officer's statement contained the contradictions, the court ruled that counsel could ask the officer if a window was broken to lure the victim out, without saying Ortiz's name.[10]

Defense counsel then asked the court if she could inquire about a statement to one of the officers that her client "said that he got a call from Antonio Ortiz, Ruben Ortiz's brother, saying that Ruben had been robbed of his money, his shoes, and his weed, and that Ruben was beaten up pretty badly." The court ruled that counsel could not refer to either Ortiz or Ortiz's brother; instead, defense counsel would be permitted to elicit that appellant received that information generally. Defense counsel objected to this limitation and the court inquired how mentioning Ortiz specifically reduced appellant's culpability. After counsel replied that "it introduces the concept of conspiracy," the court responded by accurately pointing out "[t]hat adds another charge; it doesn't reduce down your client as

[10] In his brief, appellant states that "Dailey reported that [a]ppellant said that Ortiz threw a rock through a window," while Magliaro made no mention of this; Magliaro reported that appellant said that Ortiz punched the victim and that appellant "began stabbing" him, while Dailey does not make any reference to Ortiz punching the victim. The trial court observed that it did not find these statements inconsistent. We agree. At most, it shows that appellant provided different details of the incident to one officer than to the other.

being the actual stabber or committing a felony murder." As the trial judge noted, there was no conspiracy charge in the indictment.

Under *Peterson*, *supra*, our standard of review is somewhat mixed. Generally, we accord deference to the trial judge, except when it comes to legal questions. *Peterson*, 444 Md. at 124.

The issue presented concerns the interplay between competing Sixth Amendment doctrines under *Crawford* and *Bruton*. And, for present purposes, the following passage summarizes the question before us:

> Is the hearsay statement testimonial? If so, the next question is: against whom is the evidence offered? If a co-defendant's testimonial statement is offered substantively against both the defendant and the co-defendant, and the defendant did not have a prior opportunity to cross-examine the declarant/co-defendant, then *Crawford* would directly apply and would require the court to deny admission of the statement. If a prosecutor offers the testimonial statement directly only against the co-defendant/declarant and it is deemed admissible, then in regard to the defendant, all the requirements of *Bruton*-[*Gray v. Maryland*, 523 U.S. 185 (1998)] come into play, in order to minimize the danger that a jury would not be able to follow a limiting instruction if the statement implicated the defendant.

Jezic et al., *Maryland Law of Confessions* § 29:4 at 1472-73 (2018-19 ed.) (footnotes omitted) (hereinafter, "*Maryland Law of Confessions*"); *see State v. Payne*, 440 Md. 680, 717 (2014) ("*Bruton*, then, is premised upon the Confrontation Clause of the Sixth Amendment and limits joinder, as well as the efficacy of cautionary instructions when evidence of a testimonial nature is introduced"); *see also McClurkin v. State*, 222 Md. App. 461, 478 ("Since the calls made by [the co-defendants] were not testimonial, the Confrontation Clause did not prohibit the admission of the recordings of those calls at their joint trial"), *cert. denied*, 443 Md. 736, *cert. denied*, 136 S.Ct. 564 (2015).

In the scenario here at issue and applying the passage from the *Maryland Law of Confessions*, Ortiz is the defendant and appellant is the declarant/co-defendant. We shall assume that the statements at issue that were made to the correctional officers were testimonial, as apparently did the trial judge in this case. Under that analysis, we are persuaded that Ortiz's rights under *Bruton* required redaction of the portions of appellant's statements that arguably implicated Ortiz in the underlying assault.[11]

Moreover, we conclude that any error was harmless beyond a reasonable doubt under the circumstances of this case. *See Dionas v. State*, 436 Md. 97, 108 (2013) (An error is harmless when a reviewing court is "satisfied that there is no reasonable possibility that the evidence complained of – whether erroneously admitted or excluded – may have contributed to the rendition of the guilty verdict") (citing *Dorsey v. State*, 276 Md. 638, 659 (1976)). None of the discrepancies between what appellant told Officer Dailey and what he told Officer Magliaro could have been used to impeach the credibility of either of the correctional officers. The mere fact that appellant, in his confession to Officer Magliaro, indicated that Ortiz first punched the victim, does not mean that Officer Dailey was incorrect in her version of what she was told by the appellant. Likewise, the fact that appellant told Officer Dailey that Ortiz threw a rock through a window at the Days Inn but did not mention that to Officer Magliaro, says nothing about the credibility of either of the two correctional officers. The officers were simply reporting what appellant told them; not vouching for the completeness of his version of events. And, perhaps more importantly,

[11] Nothing in appellant's statements to the officers indicated Ortiz stabbed the victim.

not one word that appellant said in his statement to the correctional officers concerning Ortiz, was exculpatory as far as appellant was concerned.

### C. To the Extent That the Doctrine of Verbal Completeness Applies, the Court Properly Exercised its Discretion

Appellant also asserts that the redactions violated the rule of verbal completeness. We note that no recorded statement or written documentation of appellant's oral statements to the correctional officers was entered into evidence. To that extent, it is not at all clear that the rule has any application. The rule is set forth in Md. Rule 5-106: "When part or all of a writing or recorded statement is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it." *See also*, *United States v. Wilkerson*, 84 F.3d 692, 696 (4th Cir. 1996) ("The rule applies only to writings or recorded statements, not to conversations"), *cert. denied*, 522 U.S. 934 (1997). In any event, even if the doctrine applied to oral conversations, given the court's aforementioned concerns under *Bruton*, and given that we are not persuaded that any exculpatory or material impeachment evidence was excluded by the court's ruling, we conclude that the court did not abuse its discretion in excluding the evidence at issue. *See Otto v. State*, 459 Md. 423, 446 (2018) ("Determining whether separate statements are admissible under the doctrine of verbal completeness is . . . a discretionary act, to be reviewed for an abuse of discretion") (citing *Conyers v. State*, 345 Md. 525, 543 (1997); *see also Canela v. State*, 193 Md. App. 259, 317 (2010) ("[N]othing in the redacted statement distorted the meaning of the statement [co-defendant] Perez made to the police or excluded any substantively

exculpatory information"), *rev'd sub nom. on other grounds*, *Perez v. State*, 420 Md. 57 (2011); *Howard v. Moore*, 131 F.3d 399, 415-20 (4th Cir.1997) (en banc) (observing that the redaction of defendant's confession, to exclude portions inculpating co-defendant, did not violate the rule of completeness), *abrogated on other grounds by Miller-El v. Dretke*, 545 U.S. 231 (2005).

**V.**

**THIRD QUESTION PRESENTED**

Appellant next asserts that the court erred by not granting a mistrial and by admitting prior bad acts evidence. The State responds that, to the extent preserved, the court properly exercised its discretion regarding both issues.

On the second day of trial, while discussing appellant's oral statements to the correctional officers, the State informed the court that appellant had been involved in a prior stabbing and that appellant told one of the officers a "dead person can't testify against you," and that "he [appellant] didn't want to make the same mistake twice." The State also informed the court that appellant said to one of the correctional officers, "if he's dead, he can't testify against you." The court ruled that "[t]he same mistake twice for a different reason doesn't come in," to which the State agreed. As for the "if he's dead" statement, the court ruled that it was admissible.

During trial, Officer Magliaro testified on direct examination, without objection, as follows:

> [Prosecutor]: Okay. Now, after he made these statements to you about what he did, did you have also any conversation with him about whether or not someone would be able to testify against him who he had stabbed?

[Officer Magliaro]: That would be correct.

[Prosecutor]: What, if anything, did he tell you about that?

[Officer Magliaro]: Inmate Jackson stated to me that, basically, that he was not going to make the same mistake twice; that he was not going to allow his victim to be able to testify against him[ ] and meaning that he would kill the individual and prevent them from testifying against him.

At the end of Officer Magliaro's testimony, the following transpired:

THE COURT: I'm going to instruct the jury to disregard the part where he said, not make the same mistake again. I thought we had –

[APPELLANT'S COUNSEL]: We had.

THE COURT: -- previously discussed this.

[ORTIZ'S COUNSEL]: We had originally.

THE COURT: And I know it's not your fault –

[PROSECUTOR]: We did. I know. And we instructed –

THE COURT: Was he told?

[PROSECUTOR]: He was told very clearly and we –

THE COURT: So I –

[PROSECUTOR]: -- I spent an hour with that paper that you have in front of you.

THE COURT: I 100 percent believe you. Yes, I get it, but –

[PROSECUTOR]: I just want to make sure that it occurred, that it – and we don't have any objection to some curative, but I want to make sure the record is clear that it's being requested that if –

THE COURT: I don't care if it's being –

[PROSECUTOR]: Whatever the –

THE COURT: -- requested or not. I'm giving it.

[PROSECUTOR]: But I'm just saying, if there's a preservation issue from the Defense, I just want to make sure that – I don't have any problem with the Court giving it sua sponte; I just want the Defense to have [an] opportunity to weigh in on the language (unintelligible) so that to the extent there is a preservation issue, I want to make –

THE COURT: Well, it's just going to be –

[PROSECUTOR]: -- sure it's clean for the record.

THE COURT: I'm just going to tell them he said, to the effect, not make the same mistake again. Completely disregard that, do not consider it, it is stricken from this record, and it may not come up in your deliberations in any way. Is that –

[APPELLANT'S COUNSEL]: I mean, I just –

[ORTIZ'S COUNSEL]: I have no dog in the fight.

THE COURT: Oh, well, yes, you don't.

[APPELLANT'S COUNSEL]: Yes.

THE COURT: Yes, why am I looking at you?

[APPELLANT'S COUNSEL]: No. I mean, I just, I was trying to figure out if he –

THE COURT: Is there anything else you want me to say?

[APPELLANT'S COUNSEL]: No, I was trying to figure out if he mumbled it enough that maybe they didn't hear, but –

THE COURT: If you don't want me to, that –

[APPELLANT'S COUNSEL]: I know, I understand –

THE COURT: -- that's a tactical decision. I agree. That's a tough call.

[APPELLANT'S COUNSEL]: Yes, no, I understand. And –

THE COURT: It did go by very quickly.

[APPELLANT'S COUNSEL]: It did.

THE COURT: I agree with you. Do you want me – do you want time to think about it?

[APPELLANT'S COUNSEL]: Yes, could I, could I have time? I just-

THE COURT: I will hold off on doing that then.

[APPELLANT'S COUNSEL]: Thank you.

Thereafter, at the end of the State's case-in-chief, the following occurred:

[APPELLANT'S COUNSEL]: So my client has asked me to ask the Court for a mistrial, and so I'm asking pursuant to my client's instructions for a mistrial.

Then if Your Honor declines my –

THE COURT: I do decline that. I think it could be, I think it was said very quickly, and as you had pointed out, and I was about to say myself, I don't know if they picked up on that or not, it was so fast it was said.

Moreover, I think it could be cured with an instruction from this Court. And as we were talking about another issue, you know, I will tell them, do not, in any way, consider that in the deliberations, and it's completely stricken from the record, and not to be discussed.

But that is a tactical decision for you and your client to decide. If you want me to give an instruction, I would work with you on how you want it worded. . . .

Appellant's counsel was granted the opportunity to discuss the proposed instruction with her client overnight. Then, at the end of the case, defendant's counsel, on behalf of her client, asked the court to give a curative instruction. With the consent of appellant's counsel, the court instructed the jury, as follows:

> I may or may not have heard Correctional Officer Magliaro was testifying he said something to the effect of not making the same mistake twice. That has been stricken by me. That may not in any way be considered by anyone. It may not be thought of by you in your deliberations in any way. It may not be regarded in any way. Consciously or subconsciously or any way in your deliberations and cannot be in any part of this verdict.

"[W]e review a court's ruling on a mistrial motion under the abuse of discretion standard." *Nash v. State*, 439 Md. 53, 66-67 (2014). "[D]eclaring a mistrial is an extreme remedy not to be ordered lightly." *Id*. at 69. And, "[t]he determining factor as to whether a mistrial is necessary is whether 'the prejudice to the defendant was so substantial that he was deprived of a fair trial.'" *Kosh v. State*, 382 Md. 218, 226 (2004) (quoting *Kosmas v. State*, 316 Md. 587, 594-95 (1989)). This standard is explained:

> The fundamental rationale in leaving the matter of prejudice vel non to the sound discretion of the trial judge is that the judge is in the best position to evaluate it. The judge is physically on the scene, able to observe matters not usually reflected in a cold record. The judge is able to ascertain the demeanor of the witnesses and to note the reaction of the jurors and counsel to inadmissible matters. That is to say, the judge has his finger on the pulse of the trial.

*Washington v. State*, 191 Md. App. 48, 103 (2010) (quoting *State v. Hawkins*, 326 Md. 270, 278 (1992)).

The Court of Appeals has identified five factors relevant to the determination of whether a mistrial is required. The factors include:

> whether the reference to [the inadmissible evidence] was repeated or whether it was a single, isolated statement; whether the reference was solicited by counsel, or was an inadvertent and unresponsive statement; whether the witness making the reference is the principal witness upon whom the entire prosecution depends; whether credibility is a crucial issue; [and] whether a great deal of other evidence exists.

*Rainville v. State*, 328 Md. 398, 408 (1992) (*quoting Guesfeird v. State*, 300 Md. 653, 659 (1984); *see also McIntyre v. State*, 168 Md. App. 504, 524 (2006) ("[N]o single factor is determinative in any case, nor are the factors themselves the test. . . . Rather, the factors merely help to evaluate whether the defendant was prejudiced.").

We hold that the trial court properly exercised its discretion in denying the request for a mistrial. Notably, no contemporaneous objection was offered when the offending testimony was elicited. Appellant's statement about "not making the same mistake twice" was isolated and there was no further testimony about the statement. As appellant's trial counsel admitted, it was not even clear whether the jury heard the offending statement. In addition, the court, at counsel's express request, gave a curative instruction. Usually, except in very rare instances, where "the trial court has admonished the jury to disregard the [objected to] testimony it has been just as consistently held that the trial court has not abused its discretion in refusing to grant a motion for a mistrial." *Wilson v. State*, 261 Md. 551, 568-69 (1971); *accord Cantine v. State*, 160 Md. App. 391, 409 (2004), *cert. denied*, 386 Md. 181 (2005).

We turn next to appellant's claim that the court erred in admitting prior bad acts evidence, i.e., that appellant threatened Officer Dailey and/or her family if she reported to the police what appellant had told her. In this regard, prior to testimony from the correctional officers, when the court was considering what statements to admit, the court addressed the admissibility of appellant's threat to Officer Dailey. Defense counsel made a motion *in limine* in which she asked that testimony about the threat be excluded as a prior bad act. The court denied that motion, finding that "a threat of a witness who's testifying

in this case, trying to preclude a witness who has evidence of your client's guilt is clear, further evidence of your client's guilt in this case" and was not other crimes evidence but instead, was "part and parcel of, in furtherance of this crime." Thereafter, the prosecutor asked Officer Magliaro, without objection, the following questions:

> Q. And following that conversation, did there come a point in time that day where you had a conversation with Mr. Jackson about Officer Dailey?
>
> A. That's correct. Towards the second half of our conversation, Inmate Jackson stated that he had become aware that Officer Dailey had known certain details about the crime that was committed that she was told by another individual, and he said that he had recently become aware that she was applying to become a Montgomery County Police, and he was worried about her telling those details —
>
> Q. And did he —
>
> A. – to the authorities.
>
> Q. In the context of explaining that he was worried she would tell —
>
> A. Uh-huh.
>
> Q. – did he tell you what he was going to do, or intended to do if she did tell people what she knew?
>
> A. That is correct. He —
>
> Q. What did he say about that?
>
> A. He stated that he wasn't worried because if she did tell, he would send somebody in his family after her.
>
> Q. And did you take that as a threat to her?
>
> A. Absolutely.

As can be seen, the objection at issue was raised earlier in a motion *in limine* but the filing, and later denial of such a motion does not ordinarily obviate the need for a contemporaneous, and timely, objection when the evidence is elicited at trial. *See Reed v. State*, 353 Md. 628, 643 (1999) (when evidence that has been contested in a motion *in limine* is admitted at trial, a contemporaneous objection must be made pursuant to Md. Rule 4-323(a) in order for that question of admissibility to be preserved for appellate review); *Prout v. State*, 311 Md. 348, 356 (1988) (with motion *in limine*, "[i]f the trial judge admits the questionable evidence, the party who made the motion ordinarily must object at the time the evidence is actually offered to preserve his objection for appellate review"), *superseded by rule on other grounds*, *Beales v. State*, 329 Md. 263 (1993). "Without an objection, the issue is typically deemed waived." *Bailey v. State*, 464 Md. 685, 698 (2019) (citing *Nalls v. State*, 437 Md. 674, 691 (2014)). We conclude that this issue as to prior bad acts is not preserved.

But, even if the issue had been preserved, the trial judge did not err. We agree with the trial judge that the threat did not meet the definition of a "prior bad act;" instead, it was a statement made by the defendant in an effort to allow him to get away with the crimes for which the declarant was standing trial.

## VI.

## FOURTH QUESTION PRESENTED

The appellant's final and most complicated argument is that the trial judge erred when he instructed the jury as to accomplice liability. The two accomplice liability instructions that appellant claims were erroneous were based on language used in *Sheppard*

*v. State*, 312 Md. 118 (1988), and adopted in Maryland Pattern Jury Instruction, MPJI-Cr. 6:00. For reasons that will be explained *infra*, appellant claims that what the Court said in *Sheppard* is no longer good law. To understand that argument, it is important to examine *Sheppard*.

Sheppard and three other men, one of whom was armed, robbed two clerks at a retail business. *Id*. at 120. They fled in an automobile and were pursued by the police whose gunshots deflated the rear tires of the getaway car. Sheppard was apprehended at the car. *Id*. at 120-21. During pursuit on foot of the other robbers, one of them fired several shots at the two police officers. *Id*. at 121. Sheppard was convicted of assault with intent to murder the two police officers, a specific intent crime. On appeal, he contended that he could not have aided and abetted the shooting because he was in police custody at the time. *Id*. Rejecting that contention, the Court of Appeals said:

> An accomplice is a person who, as a result of his or her status as a party to an offense, is criminally responsible for a crime committed by another. This responsibility, known as accomplice liability, takes two forms: (1) responsibility for the planned, or principal offense (or offenses), and; (2) responsibility for other criminal acts incidental to the commission of the principal offense. In order to establish complicity for the principal offense, the State must prove that the accused participated in the offense either as a principal in the second degree (aider and abettor) or as an accessory before the fact (inciter). In order to establish complicity for other crimes committed during the course of the criminal episode, the State must prove that the accused participated in the principal offense either as a principal in the first degree (perpetrator), a principal in the second degree (aider and abettor) or as an accessory before the fact (inciter) and, in addition, the State must establish that the charged offense was done in furtherance of the commission of the principal offense or the escape therefrom.

*Id*. at 122-23 (footnote and internal citations omitted) (emphasis added).

In *Sheppard*, the Court explained the difference between the principal offense and other offenses that were incidental to it.

> [T]he principal offense was the armed robbery of the two women at the liquor store. The aggravated assaults against the police officers, perpetrated during the escape from the commission of the robbery, were secondary or incidental offenses. Thus, contrary to Sheppard's contention that his responsibility for the aggravated assaults is dependent upon proof that he aided and abetted the commission of those offenses, Sheppard's complicity rests on the fact that he aided and abetted the armed robbery.

*Sheppard*, 312 Md. at 123.

The first type of accomplice liability as explained in *Sheppard*, is "responsibility for the planned, or principal offense," which meant that such liability would occur if, for instance, Ortiz knowingly aided, counselled, commanded or encouraged Jackson to kill the victim. This is what appellant refers to in his brief as "the standard form of accomplice liability." In this case, the jury was instructed as to that type of accomplice liability as follows:

> So either defendant may be guilty of murder as an accomplice even though that defendant did not personally commit the acts that constitute that crime. In order to convict the defendant of murder as an accomplice the State must prove that the murder occurred and that the defendant with the intent to make the crime happen knowingly aided, counseled, commanded, or encouraged the commission of a crime or communicated to a participant in the crime that he was ready, willing, and able to lend support if needed.
>
> The mere presence of the defendant at the time and place of the commission of the crime is not enough to prove that the defendant is an accomplice. If presence at the scene of the crime is proven, that fact may be considered along with all of the surrounding circumstances in determining whether the defendant intended to aid a participant and communicated that willingness to a participant.

Appellant acknowledged that the court did not err when it gave the above instruction. He does contend that the court erred in instructing as to the second type of accomplice liability, which imposes criminal responsibility for other criminal acts incidental to the commission of the principle offense. In his brief, appellant refers to this as the "*Sheppard* form" of accomplice liability.

In support of his argument that the "*Sheppard* form" of accomplice liability instructions were erroneous, appellant relies on language used by the Court of Appeals in *State v. Jones*, 451 Md. 680 (2017) and by this Court in *Hallowell v. State*, 235 Md. App. 484 (2018). Neither of those cases dealt with accomplice liability but instead dealt with the felony murder rule. Therefore, to understand appellant's argument, it is important to review what the Court of Appeals said in *Jones* and what we said in *Hallowell*.

In *Jones*, the court explicitly overruled *Roary v. State*, 385 Md. 217, 222 (2005). In *Roary*, the Court of Appeals said:

> We hold that first-degree assault is a proper underlying felony to support a second-degree felony-murder conviction.

*Id*.

Twelve years later, in *Jones*, Judge Raker, speaking for a 4-3 majority, overturned *Roary* and explained why:

> We take this opportunity to re-examine *Roary v. State*, to overrule it and to adopt the so-called "merger doctrine" in Maryland. A common limitation of the application of the felony-murder doctrine is the merger doctrine. The merger doctrine, first conceived in the nineteenth century, bars the application of the felony-murder doctrine whenever the underlying felony is an integral element of the homicide. In other words, to support a charge of felony murder, the underlying felony must be independent of the homicide.

451 Md. at 694 (citations and footnote omitted).

The *Jones* majority went on to observe that "the felony-murder doctrine has been described as 'a highly artificial concept that deserves no extension beyond its required application.'" *Id*. at 698. Next, after an extensive review of cases from other states, the *Jones* majority stated:

> We join the large majority of our sister states and conclude that the better and more legally sound approach is to adopt the "merger rule" and require that for second-degree felony murder, the inherently dangerous predicate felony must be one that is independent of the homicide.

*Id.* at 706.

In her concluding paragraph of the *Jones* opinion, Judge Raker wrote:

> In order to maintain the integrity of the different levels of culpability of murder and manslaughter and to ameliorate its perceived harshness, today we adopt the "merger doctrine" and we hold that first-degree assault that results in the victim's death merges with the homicide and therefore cannot serve as an underlying felony for the purposes of the felony murder rule. *Roary v. State*, 385 Md. 217, 867 A.2d 1095 (2005), is overruled. First-degree assault, either intent to inflict serious physical injury or assault with a firearm, cannot, as a matter of law, serve as the underlying felony to support felony murder. The assaultive act merges into the resultant homicide, and may not be deemed a separate and independent offense that could support a conviction for felony murder. Where the only felony committed (apart from the murder itself) was the assault upon the victim that resulted in the death of the victim, the assault merges with the killing and cannot be the predicate for felony murder[.]

*Id*. at 708 (emphasis added).

In *Hallowell*, *supra*, this Court applied the principles established in *Jones*. The trial in *Hallowell* took place prior to the publication of the *Jones* decision. Accordingly, the jury was instructed in regard to felony-murder in accordance with the *Roary* decision. 235

Md. App. at 492-93. In *Hallowell*, we held, based on *Jones*, that defendant's second-degree murder conviction should be reversed despite trial counsel's failure to object to the felony-murder instruction. *Id*. at 506.

In this case, based on *Jones* and *Hallowell*, appellant contends that if first-degree assault may not serve as the predicate for second-degree felony murder when that assault is not collateral to the lethal act, then, by parity of reasoning, the pattern jury instruction (MPJI-Cr. 6:00) that was used in this case and which contained the "*Sheppard* form" language was erroneous. A correct statement of the law according to appellant, required the jury to be instructed that a defendant could not be held responsible for murder under the second form of accomplice liability based on a finding that the defendants committed first-degree assault, if that assault was not collateral to the lethal act.

We turn now to the two instructions that appellant claims were erroneous. The first instruction read:

> In this case, in order to convict a defendant of premeditated murder, the State must prove beyond a reasonable doubt (1) the defendant committed the crime of assault or robbery either as the primary actor or as an accomplice; (2) that the crime of premeditated murder was committed by an accomplice; and (3) that the crime of premeditated murder was committed by an accomplice in furtherance of or during the escape from the underlying crime of assault or robbery. And the assault is first degree assault.
>
> We'll amend that too. First degree assault. It is not necessary that the defendant knew an accomplice was going to commit an additional crime. Furthermore, the defendant need not have participated in a fashion in the additional crime. In order for the State to establish accomplice liability for the additional crime, the State must prove that the defendant actually committed the planned offense or a defendant aided or abetted in that offense and that the additional criminal offense not within the original plan was done in furtherance of the commission of the planned criminal offense or the escape therefrom.

(Emphasis added.)

The parts of the pattern jury instruction that we have emphasized are the parts that appellant contends violated the principles enunciated in *Jones* and *Hallowell*.

At trial, appellant's counsel generally objected to the instruction just quoted but articulated no clear grounds for the objection. More specifically, nothing said by appellant's counsel at trial, in any way, alerted the trial judge that counsel was objecting for the reasons now set forth. This contravened the first sentence of Md. Rule 4-325(e) which reads:

> No party may assign as error the giving or the failure to give an instruction unless the party objects on the record promptly after the court instructs the jury, stating distinctly the matter to which the party objects and the grounds of the objection.

In his brief, appellant contends that giving the instruction, just quoted, constituted plain error. We will discuss the plain error doctrine, *infra*, in regard to a second instruction the court gave in answer to a jury note. But we need not decide whether the instruction above quoted, which was given to the jury in written form as well as orally, constituted plain error because that instruction only dealt with premeditated first-degree murder. Even if it was error to give that instruction, appellant could not have been prejudiced because he was convicted of second-degree murder—not first-degree murder.

We turn next to a discussion of the jury notes that were answered by the trial judge.

The first question the jury asked was "[i]s it possible to have accomplice liability to 2nd degree murder?" The trial judge answered that question in the affirmative. If either appellant or Ortiz was an accomplice to robbery, each could be convicted of second-degree

murder under an accomplice liability theory. *See e.g., Jones v. State*, 178 Md. App. 454, 477 ("[W]e conclude that the evidence was sufficient to sustain appellant's conviction for second-degree murder, or, at the very least, as an accomplice thereto"), *aff'd*, 407 Md. 33 (2008). Appellant's counsel did not object to that answer. And, on appeal, even under appellant's interpretation of the current state of the law, the answer was correct because appellant and Ortiz were charged with robbery.

The jury also asked, "is armed robbery a necessary element of felony murder, or does 1st degree assault satisfy the 1st element of 1st degree felony murder?" The trial judge correctly responded as follows: "1st degree assault may not be a predicate for felony murder. Armed robbery may be a predicate for felony murder." (emphasis in original). That response was an accurate statement of law and was applicable under these circumstances inasmuch as armed robbery (in contrast to first-degree assault), is set forth as a predicate offense for first-degree felony murder by statute. *See* Md. Code (2002, 2012 Repl. Vol.) § 2-201(a)(4)(ix) of the Criminal Law Article.

The jury came back an hour later asking two additional questions. First:

> Do we have to find one Def guilty of 1st or 2nd degree murder in order to find the other guilty of accomplice liability?
>
> Or is it sufficient that we believe a murder occurred to find both Defs guilty of accomplice liability?

The jury also asked:

> If we find one or both Defs guilty of accomplice liability, how do we indicate that on the verdict sheet?

After a lengthy discussion as how to respond to these questions, the court asked counsel if anyone objected to his proposed answer. There was no objection. The court then orally instructed as follows:

> THE COURT: All right, I've received your notes, timed 6:19, notes 1 and 2. Really there are three questions all seem to be interrelated on the accomplice liability instruction. Accomplice liability is not a separate crime, that's why it's not on the verdict sheet. Accomplice liability is a theory which someone can be found guilty for crimes where they did not [meet] each and every one of the elements. I know I told you earlier that each element of the crime must be proven beyond a reasonable doubt. And that's still true, but they also can be guilty for acts of a person that they acted with, as the instruction says. If they in any way knowingly aided, counseled, commanded or encouraged the commission of a crime and/or were willing and able to lend support if needed. That's the first part of accomplice liability.
>
> And then the second part, page 2 of it has a slightly different twist type of accomplice liability. And that is when someone could be found guilty where, again, in this case an agreement again, not a written agreement, some type of agreement to acting together to commit a robbery or an assault and the accomplice of one of them commits a murder and if that murder was in furtherance of or during the escape from the underlying crime of the assault or robbery that they were acting in conjunction on. I don't know if that's helped you any or not. Let me talk to the attorneys for a second, okay.
>
> * * *
>
> Just to let you know the accomplice liability goes both ways, you know. It applies to each defendant. And for, accomplice liability applies for any type of crime that is charged in this case at least.

(Emphasis added.)

Appellant's trial counsel did not object to the answer just quoted after it was given. Instead, he asks for us to overlook the lack of preservation and apply the plain error doctrine. In that regard, he argues that there is no ambiguity in the trial judge's response to the jury's question in that it permitted "conviction of Ortiz or [a]ppellant for second-

degree murder—'a murder,' a 'type of crime that is charged in this case'—on the basis of *Sheppard* accomplice liability where the intended crime is first-degree assault." According to appellant, inasmuch as the *Sheppard* form accomplice liability theory was built upon the felony-murder doctrine, an accomplice to first-degree assault may not, on that basis, be convicted of second-degree murder.

The third sentence in Md. Rule 4-325(e) reads:

> An appellate court, on its own initiative or on the suggestion of a party, may however take cognizance of any plain error in the instructions, material to the right of the defendant, despite a failure to object.

Appellant's argument in regard to the answer to the third jury note is as follows:

> Reading the State's closing and rebuttal arguments in light of the jury's readiness to find that both [a]ppellant and Ortiz were guilty of second-degree murder as accomplices (necessarily finding that another co-defendant – Antonio Ortiz being a likely candidate – stabbed Jalloh), what the State said about the liability of Ortiz applies equally well to [a]ppellant: even if [a]ppellant did not intend "to stab or kill" Jalloh, he is guilty of second-degree murder because he committed first-degree assault. Given the jury's verdict acquitting [a]ppellant of premeditated murder, which suggests that the jury did not fully accept [a]ppellant's alleged confession or find Cox's testimony wholly credible, and given the ambiguity inherent in the remainder of the State's evidence, e.g., the surveillance footage inconclusive as to who stabbed Jalloh, there is a substantial likelihood that the jury concluded that [a]ppellant committed a first-degree assault and was guilty of the additional crime of second-degree murder as a crime furthering the assaultive enterprise undertaken by [a]ppellant and other co-defendants, i.e., the first-degree assault as the intended offense was not collateral to the murder.
>
> The result is that the State was relieved of "having to prove malice in order to obtain a murder conviction," *Jones*, 451 Md. at 702, thereby thwarting the legislature's statutory homicide scheme, just as assuredly as if the court had instructed the jury that first-degree assault could serve as the predicate felony for second-degree murder. Just as the *Jones* Court found no justification for expanding the felony murder doctrine through use of first-degree assault as the predicate felony, there is no justification for expanding accomplice liability through the use of first-degree assault as the planned

> offense. For the above reasons, the court erred in instructing the jury on the *Sheppard* form of accomplice liability, permitting the jury to find [a]ppellant guilty of second-degree murder predicated upon his commission of first-degree assault.

The State does not argue that appellant misconstrues the effect of the *Jones* decision on accomplice responsibility. But it does not explicitly agree with that construction either. Instead, it argues, unconvincingly, that read in context, the "*Sheppard* [form] instruction [in the response to the jury notes] was confined to premeditated murder[.]" As a consequence, in the State's view, the instruction was harmless to appellant's conviction of second-degree murder. It argues, in the alternative, that in any event, this issue should not be addressed, because it was not preserved. In that regard, the State maintains that this is not one of those rare occasions where we would apply the plain error doctrine.

Appellant argues that we should undertake plain error review because endorsing such an instruction as occurred here in answer to the jury notes would amount to an "end-run around *Jones*" and would "undue [sic] the abrogation" of a recent change in pattern instruction on second-degree felony murder that was based on *Jones*. Relying, in part, on *Hallowell v. State*, 235 Md. App. 484, 506 (2018), in which this Court overruled a felony murder conviction based on *Jones* in a trial that occurred prior to the *Jones* decision, appellant asserts:

> In the wake of *Jones*, with a conviction for second-degree felony murder premised on a non-collateral first-degree assault now foreclosed, there will be certain to follow more cases like [a]ppellant's testing the viability of a second-degree murder conviction premised on *Sheppard* accomplice liability where the intended crime is a non-collateral first-degree assault. This field has not been ploughed at all, let alone thoroughly, and [a]ppellant's case, "beyond the confines of this particular case," is both an appropriate and necessary vehicle for answering the important legal question his case raises.

Appellant further argues:

> [T]his case presents this Court with an opportunity to provide necessary guidance to trial courts regarding the use of *Sheppard* accomplice liability predicated on first-degree assault as a basis for second-degree murder liability – the obvious next question following *Jones*. Invoking Rule 8-131(a), authorizing appellate review of unpreserved issues when "necessary or desirable to guide the trial court," the *Roary* Court reached the unpreserved challenge to the instruction on second-degree felony murder predicated on first-degree assault. 385 Md. at 225-26. This Court has every reason to follow suit. *See also Austin* [*v. State*], 90 Md. App. [254] at 271 [(1992)] (decision to notice plain error influenced by opportunity "to illuminate some murky recess of the law").

As Judge Wilner explained in *Chaney v. State*, 397 Md. 460, 468 (2007), the discretion to grant plain error review:

> is a discretion that appellate courts should rarely exercise, as considerations of both fairness and judicial efficiency ordinarily require that all challenges that a party desires to make to a trial court's ruling, action, or conduct be presented in the first instance to the trial court so that (1) a proper record can be made with respect to the challenge, and (2) the other parties and the trial judge are given an opportunity to consider and respond to the challenge.

"Plain error is error that is so material to the rights of the accused as to amount to the kind of prejudice which precluded an impartial trial." *Steward v. State*, 218 Md. App. 550, 565 (2014) (quotation marks and citation omitted); *Malaska v. State*, 216 Md. App. 492, 524 (2014) (quotation marks and citation omitted) (explaining that plain error review can remedy defects that denied "a defendant's right to a fair and impartial trial"). Our discretion to recognize plain error is plenary. *Austin*, 90 Md. App. at 262-64, 268; *see also Morris v. State*, 153 Md. App. 480, 513 (2003) ("Reversible error . . . is assumed, as a given, before the purely discretionary decision of whether to notice it even comes into play") (citation omitted). Furthermore, plain error review is "'reserved for those errors that

are compelling, extraordinary, exceptional or fundamental to assure the defendant of a fair trial.'" *Hallowell*, 235 Md. App. at 505 (quoting *Newton v. State*, 455 Md. 341, 364 (2017)). "In order to be 'extraordinary,' and thus cognizable on review, an error must be more than prejudicial, indeed, more than merely reversible, had the error been properly preserved." *Steward*, 218 Md. App. at 568 (quoting *Morris*, 153 Md. App. at 511). Notably, when an issue is raised as to an alleged defective jury instruction, Maryland appellate courts "have been rigorous in adhering steadfastly to the preservation requirement." *Peterson v. State*, 196 Md. App. 563, 589 (2010) (quotation marks and citations omitted); *see also Taylor v. State*, 236 Md. App. 397, 447 (2018) ("'[I]n the context of erroneous jury instructions, the plain error doctrine has been used sparingly'") (quoting *Conyers v. State*, 354 Md. 132, 171 (1999)).

We concede that appellant may conceivably be right, based on the *Jones* Court's adoption of the "merger rule," in arguing that the judge's answer to the third jury note was erroneous. But the error is far from "plain" as it was not recognized by the experienced judge who tried this case or by two veteran defense lawyers who represented appellant and Ortiz. For that matter, the "error" was not recognized or even mentioned by Ortiz's appellate lawyer in his brief filed with this Court.

It is theoretically possible that the judge's answer to the third jury note could have been prejudicial to appellant but possible prejudice is not enough to grant plain error review. In fact, in all likelihood the instruction, assuming it was erroneous, prejudiced Ortiz – not appellant, because the State consistently took the position at trial that it was Ortiz that was the accomplice – not appellant. The State never once argued that appellant

was guilty of murder under the *Sheppard* form of accomplice liability. The State's evidence and its consistent position at trial, was that appellant, by stabbing the victim, committed murder and Ortiz was his accomplice. The State's closing argument reflects this position:

> When these two formulated the intent to assault and to rob someone they became liable for all of the acts of their co-conspirators. They became responsible for every punch, every kick, and every stab that is inflicted upon Mr. Jalloh. It is of no moment that he did the stab[b]ing and he did the punching.
>
> * * *
>
> When he became a part of that assault and he became a part of that robbery he became an accomplice to any and all of the acts that the other co-conspirator engaged in. Judge Maloney told you and sometimes people have to think for a moment to square this in their heads.
>
> * * *
>
> A defendant may also be found guilty as an accomplice of crimes that he did not assist in or even intend to commit. Okay? So if you're deliberating whether or not this man intended for Mr. Jackson to stab or kill the victim is not significant. Once he joins in, he is responsible for Mr. Jackson's actions. Specifically, it is not necessary for a defendant to know – for Mr. Ortiz to know his accomplice is going to commit an additional crime. Furthermore, the defendant, Mr. Ortiz, need not have participated in any fashion.
>
> * * *
>
> There are two separate ways someone can be an accomplice.
>
> (1) you can aid, counsel, command, or encourage someone to do a crime. That's one way. . . . (2) A defendant may also – my emphasis on the word "also" because that's the second way you can be an accomplice – also be found guilty as an accomplice of crimes that he did not assist in or even intend to commit.
>
> So when counsel tells you you need to have the intent to have a crime happen, that is wrong. That is a misstatement of the law….

> Mr. Ortiz does not have to know that Mr. Jackson is going to commit a murder or a stabbing to be guilty of murder.

(Emphasis added.)

The State had good reason for its failure to argue that appellant was an accomplice to murder because there was no evidence, circumstantial or direct, that co-defendant Ortiz or Antonio Ortiz stabbed the victim.

Appellant contends, based on the content of the jury notes, that there was a "substantial likelihood" that the jury convicted appellant based on a "*Sheppard* form" of accomplice liability and therefore he asserts that he was denied the right to a fair trial. As mentioned, according to appellant, a jury note "showed a readiness" to convict both Ortiz and appellant of second-degree murder, which meant that the jury made a "finding" that a third-party (probably Antonio Ortiz) actually stabbed the victim. This argument is based on pure speculation. The note did not show a "readiness" to convict anyone. In our view, it is highly unlikely (if one assumed that the jury based its verdict on the evidence presented) that the jury believed that appellant was an accomplice but not a principal. No evidence was presented that anyone except appellant had a knife or stabbed anyone.

We also reject appellant's argument that the jury's acquittal of appellant for first-degree murder "suggests" that the jury did not "fully believe" the correctional officers who testified that appellant told them that he was the one who stabbed the victim. There is nothing inconsistent about fully believing the officers and convicting appellant "only" of second-degree murder. Likewise, nothing in the jury verdict suggests that the jury didn't believe Cox.

Under all the above circumstances, we are not persuaded that this is one of those rare cases where the trial judge's "error" was "so material to the rights of [appellant] as to amount to the kind of prejudice [that] precluded an impartial trial." *Steward*, 218 Md. App. at 565 (quotation marks and citation omitted). We therefore decline to grant plain error review.

**JUDGMENT AFFIRMED. COSTS TO BE PAID BY APPELLANT**.